

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>ESTATE OF DENNIS K. NASON,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 93-153 B</b>
	)	
<b>DONNA E. SHALALA,</b>	)	
<b>Secretary of Health</b>	)	
<b>and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff's decedent could perform sedentary work existing in significant numbers in the national economy. The plaintiff contends that the Administrative Law Judge erroneously failed to consider the decedent's complaints of chest pain and adverse reactions to medication when assessing his functional capacity.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the decedent had not engaged in substantial

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<sup>1</sup> This action is properly brought under 42 U.S.C. 405(g) and 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted its administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which it seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 14, 1993 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

gainful activity since February 11, 1990, the alleged onset of his disability, Finding 2, Record p. 21; that he met the disability insured status requirements as of that date, but continued to meet those requirements only through December 31, 1990,<sup>2</sup> Finding 1, Record p. 21; that the medical evidence established that he had severe chest pain associated with a history of myocardial infarction, but that he did not have an impairment or combination of impairments which meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. 404 (the "Listings"), Finding 3, Record p. 21; that he was unable to perform his past relevant work as a laborer, glazer and maintenance worker, Finding 6, Record p. 21; that he had the residual functional capacity to perform at least the full range of sedentary work, Finding 7, Record p. 21; that "[the decedent's] assertions concerning his impairment and its impact on his ability to work [we]re not persuasive in light of [his] own description of his activities, and discrepancies between [his] assertions and information contained in the documentary reports," Finding 4, Record p. 21; and that, based on an exertional capacity for sedentary work, his age (49), education (limited) and vocational background (skilled, non-transferrable), application of Rule 201.19 of the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. 404 (the "Grid"), directed a finding that he was not disabled, Findings 7-12, Record pp. 21-22. The Appeals Council declined to review the decision, Record pp. 6-7, making it the final determination of the Secretary. 20 C.F.R. 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g), 1383(c)(3); *Lizotte v. Secretary of Health*

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<sup>2</sup> The decedent applied for both Disability and Supplemental Security Income benefits. For Disability benefits, the decedent carried an initial burden of proving that he was disabled before the expiration of his insured status on December 31, 1990. *Cruz Rivera v. Secretary of Health & Human Servs.*, 818 F.2d 96, 97 (1st Cir. 1986), *cert. denied*, 479 U.S. 1042 (1987). The decedent's eligibility for Supplemental Security Income benefits, however, was not dependent upon his insured status. 20 C.F.R. 416.202. In his written opinion, the Administrative Law Judge concluded that the decedent, though suffering from a heart impairment, was not under a disability at any time before or after December 31, 1990. Record p. 21. I note that the Administrative Law Judge raised no timing issue concerning the onset date of his heart impairment. *See id.*; Finding 3, Record p. 21. Therefore, as to the Disability benefits question, I will address this appeal as not presenting a timing issue concerning proof of disability.

*& Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the decedent is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the decedent's ability to do other work in the national economy. 20 C.F.R. 404.1520(f); 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the decedent's residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health and Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

In February 1990 the plaintiff's decedent was hospitalized for ten days at the Eastern Maine Medical Center ("EMMC"), complaining of chest pain. Record p. 157. He was diagnosed with acute anterior myocardial infarction, *id.* at 158, better known as a heart attack. On April 17, 1990 he was readmitted to EMMC, again complaining of chest pains. *Id.* at 193. He was diagnosed as being status post myocardial infarction with probable unstable angina. *Id.* Again, on April 30, 1990 the decedent returned to EMMC due to burning chest pains. *Id.* at 210. His condition, as diagnosed previously, remained unchanged. *Id.* On September 15, 1990 the decedent was brought to the emergency room of EMMC after losing consciousness. *Id.* at 235. The cause of his loss of consciousness was uncertain. *Id.* He was advised to limit his activities to "only light walking as tolerated." *Id.* at 236. On January 4, 1991 the decedent was readmitted to EMMC for escalating chest pains. *Id.* at 252. His treating physician, Kevin Miller, M.D., opined that the chest pain could be of anginal origin. *Id.* at 252, 296. He was released on January 10, 1991 with instructions that he limit his activities to "only light walking as tolerated." *Id.* at 252-53.

From June 1990 until the administrative hearing on November 1, 1991, the decedent visited Dr. Miller approximately every four to six weeks for follow-ups. Record pp. 290-99, 332-34. During these visits the decedent consistently complained of burning chest pains. *Id.* Dr. Miller's medical notes also indicate that the decedent's condition worsened over the course of his follow-ups. *See id.* For instance, while on June 14, 1990 the decedent reported that his episodes of chest pain occurred twice weekly, by April 26, 1991 he reported that his chest pain was present ``98% of the time." *Compare id.* at 290 *with id.* at 298. In July 1991 the decedent reported ``frequent episodes of chest pain daily," usually induced by exertion. *Id.* at 332. He stated that he frequently has to lie down for relief. *Id.* From July through October 1991 Dr. Miller noted no changes in the decedent's symptoms. *Id.* at 333-34.

After the administrative hearing on November 1, 1991, the Administrative Law Judge concluded that the decedent retained the residual functional capacity to perform the full range of sedentary work. Finding 7, Record p. 21. Citing the medical reports of Dr. Miller, the Administrative Law Judge found that the decedent possessed the exertional capabilities required for sedentary work despite his heart condition. Record p. 19. As for any limitations resulting from pain, the Administrative Law Judge concluded that the decedent's allegations that his pain would prevent him from performing even sedentary work were unpersuasive. Record p. 20. The Administrative Law Judge found that the decedent's own description of his daily activities indicated that he could perform sedentary work despite complaints of pain. *Id.* The Administrative Law Judge also noted discrepancies between the decedent's assertions of pain and information contained in the medical records. *Id.*

The regulations promulgated by the Secretary define ``sedentary work" as follows:

*Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other

sedentary criteria are met.

20 C.F.R. 404.1567(a), 416.967(a). In Social Security Ruling 83-10, the Secretary further refined the definition of sedentary work:

“Occasionally” means occurring from very little up to one-third of the time. Since being on one's feet is required “occasionally” at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday.

Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992).

In short, sedentary work requires an ability to lift no more than ten pounds, to sit for about six hours and to walk or stand for about two hours out of an eight-hour workday. *Id.*

When determining whether a claimant can perform the exertional requirements of sedentary work, the Secretary must evaluate both the objective and subjective evidence of exertional limitations. 20 C.F.R. 404.1569a, 416.969a. If a claimant has a medical impairment which can reasonably be expected to produce pain, as here, the Secretary must consider the claimant's subjective allegations to determine the degree of functional impairment, if any, caused by pain. *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21, 23 (1st Cir. 1986); Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 654-55 (1992); 20 C.F.R. 404.1529(d)(4), 416.929(d)(4). The Secretary's consideration of the subjective allegations must include an examination of the duration, frequency and intensity of any pain and the adverse side effects of any pain medication. Social Security Ruling 88-13, at 655. Additionally, when evaluating the subjective evidence of pain, the Secretary must discuss and explain her analysis concerning the existence or nonexistence of any functional impairments caused by pain. *Id.* Specifically, Social Security Ruling 88-13 provides as follows:

In evaluating a claimant's subjective complaints of pain, the adjudicator must give full consideration to all of the available evidence, medical and other, that reflects on the impairment and any

attendant limitations of function.

The RFC [residual functional capacity] assessment must describe the relationship between the medically determinable impairment and the conclusions of RFC which have been derived from the evidence, and must include a discussion of why reported daily activity restrictions are or are not reasonably consistent with the medical evidence.

In instances in which the adjudicator has observed the individual, the adjudicator is not free to accept or reject that individual's subjective complaints solely on the basis of such personal observations. Rather, in all cases in which pain is alleged, the determination or decision rationale is to contain a thorough discussion and analysis of the objective medical evidence and the nonmedical evidence, including the individual's subjective complaints and the adjudicator's personal observations. The rationale is then to provide a resolution of any inconsistencies in the evidence as a whole and set forth a logical explanation of the individual's capacity to work.

*Id.*

Considered by itself, the objective evidence of the decedent's heart condition supports a determination that the decedent could have performed the exertional requirements of sedentary work. Despite references in the medical history limiting his activities to light walking only, the record nevertheless contains other objective evidence indicating that the decedent would have been medically capable of enduring sedentary work. For instance, in his medical reports the decedent's treating physician, Dr. Miller, provided significant medical information regarding the decedent's ability to do various physical activities. Record pp. 311-13. On May 24, 1990 Dr. Miller stated that the decedent should restrict his lifting to thirty pounds and carrying to less than twenty pounds. *Id.* at 312. The decedent himself testified that he could probably lift twenty to thirty pounds. *Id.* at 36. Dr. Miller has consistently reported that the decedent has no restrictions on sitting. *Id.* at 311-13. On December 19, 1990 Dr. Miller stated that the decedent could not perform a job "which would require prolonged standing or any significant walking." *Id.* at 313. However, he went on to say that

``[a] job with sitting with very mild short distance walking probably could be tolerated." *Id.* Subsequently, on March 29, 1991 Dr. Miller indicated that the decedent ``should have no problems with . . . standing or light walking for short distances." *Id.* at 311. Earlier he had also stated that ``[a]ctivities such as light walking, say a hundred feet or so[,] would be fine." *Id.* at 312.

In addition to the job-related reports of Dr. Miller, the record contains three written residual functional capacity assessments completed by medical consultants to the Secretary. Record pp. 81-88, 96-103, 109-16. Each one of the three written assessments concluded that the decedent could perform the exertional requirements of sedentary work. *Id.* at 82, 97, 110. I note that two of the residual functional capacity assessments were completed after Dr. Miller's reports and reflected a consideration of his statements about the decedent's physical capacities. *Id.* at 102-03, 115-16.

The medical reports of Dr. Miller, together with the three written residual functional capacity assessments, support the Administrative Law Judge's conclusion that the objective evidence indicates that the decedent possessed the physical capabilities to perform sedentary work. As the Administrative Law Judge noted, neither ``prolonged standing" nor ``significant walking," restrictions imposed by Dr. Miller, are necessary for the performance of sedentary work. Record p. 19. Moreover, even though the record contains some medical evidence suggesting that the decedent may not have retained the exertional capabilities to perform even sedentary work, given the worsening nature of his condition, *see, e.g., id.* at 295, 313, 332, resolution of conflicts in the medical evidence is for the Secretary, not the courts. *Irlanda-Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). Thus, because the record contains objective medical evidence indicating that the decedent could have performed the exertional requirements of sedentary work, I conclude that this determination is supported by substantial evidence.

The same, however, cannot be said about the Administrative Law Judge's consideration of the decedent's subjective allegations, namely, complaints of chest pain and headaches resulting from his medication. The decedent's medical record is replete with complaints of constant, burning

chest pain. At the hearing, the decedent said his chest pain was ``like somebody is sitting on you, crush[ing] you." Record p. 29. The Administrative Law Judge initially stated that the decedent's allegations of pain seemed credible in light of the medical documentation. *Id.* at 20. He concluded, however, that the decedent's own description of his physical activities suggested he was capable of performing sedentary work. *Id.* Then, after outlining the decedent's physical activities, which included driving, fishing and some household chores, the Administrative Law Judge, mysteriously, stated as follows: ``To the extent that Mr. Nason alleges that his impairment has prevented him from performing even sedentary work on a sustained basis, his allegations of pain and other subjective complaints are not persuasive." *Id.* Given the Administrative Law Judge's initial comment crediting the decedent's testimony on pain, this subsequent comment discounting the decedent's complaints of pain is hard to explain. However, I need not attempt to explain this incongruity because I find that the Administrative Law Judge's stated reasons for discounting the decedent's subjective allegations of pain are without basis.

First, the Administrative Law Judge concluded that the decedent's described activities -- driving, fishing and household chores -- suggested that he was capable of performing sedentary work. *Id.* However, the Administrative Law Judge failed to address evidence suggesting that the decedent could only fish for a few minutes before developing chest pain. *Id.* at 332. He also failed to mention the decedent's testimony that he would fish with someone else and give them the rod to reel in the fish because he was unable to do so. *Id.* at 43-44. As for household chores, the decedent testified that he did *not* help with household chores. *Id.* at 30, 134, 142. I can glean no evidence from this record, and the Secretary could not cite any at oral argument, that the decedent helped with household chores, as reported by the Administrative Law Judge. Finally, the Administrative Law Judge stated that the decedent's written statements contained discrepancies with the medical records. *Id.* at 20. Specifically, the Administrative Law Judge wrote as follows:

There are some discrepancies in the [decedent's] written statements and the information contained in the documentary medical reports.



In his reconsideration disability report, prepared in March of 1991, Mr. Nason stated that he has been experiencing more pain and that it lasts longer (Exhibit 22). However, treatment notes in April of 1991 describe continuing chest pain but reveal no evidence of any worsening in his condition (Exhibit 30).

*Id.* However, upon my review of the April 1991 treatment notes, I find that they do indeed describe a worsening condition, contrary to the Administrative Law Judge's reading. In particular, Dr. Miller reported as follows: "Mr. Nason feels no better. He notes this chest pain which is *now* there `98% of the time.'" *Id.* at 298 (emphasis added). This language certainly supports the decedent's March 1991 assertion that his pain had been worsening. *Id.* at 147. In light of these cumulative factual errors in the analysis, I cannot conclude that the Administrative Law Judge's evaluation of the decedent's complaints of disabling chest pain is supported by substantial evidence.

Likewise, I find that the Administrative Law Judge's evaluation of the decedent's claimed adverse reactions to his medication is insufficient. Following his February 1990 heart attack, the decedent was prescribed a laundry list of medications. Record p. 331. The decedent claimed that the nitroglycerin patch,<sup>3</sup> which he wore twice weekly to relieve his chest pain, caused him to suffer severe headaches. *Id.* at 34-35, 340. The headaches, which the decedent claimed were constant when wearing the patch, were described as "quite bad, you have the top of your head coming right off." *Id.* at 30, 34-35. The decedent claimed the headaches were so bad that he could not function while wearing the patch. *Id.* at 35. In addition to his testimony, the medical records note that the decedent was unable to tolerate the nitroglycerin patch due to severe headaches. *Id.* at 293, 340.

During the decedent's testimony concerning the headaches, the Administrative Law Judge indicated that he was aware that headaches were a common side effect with the use of a nitroglycerin patch.<sup>4</sup> Record p. 30. Nonetheless, in his written opinion his only reference to the

<sup>3</sup> The nitroglycerin patch is a transdermal system that supplies nitroglycerin on a constant basis for relief of angina. *Physician's Desk Reference* 1353-54 (Minitran), 2386-87 (Transderm-Nitro) (47th ed. 1993). The decedent apparently used both the Transderm-Nitro and Minitran brands over the course of his treatment. Record pp. 293, 331, 375.

<sup>4</sup> I note that the *Physician's Desk Reference* states that severe headaches are the most common adverse reaction to the use of

decedent's asserted adverse reactions was a single sentence: ``He indicated that he sometimes develops headaches and dizziness as a result of the medication." *Id.* at 20. Other than this cursory comment, the Administrative Law Judge made no assessment or specific findings regarding the impact of the decedent's headaches or dizziness on his functional capacity. Indeed, despite supporting medical documentation and his own knowledge of the side effects of the nitroglycerin patch, the Administrative Law Judge provided no evaluation of the decedent's subjective allegations, no mention of the medical documentation and no reasoning why his complaints were rejected. Accordingly, the Administrative Law Judge did not properly evaluate the decedent's claimed adverse reactions to his medication as required by *Avery* and Social Security Ruling 88-13.

In summary, although the objective medical evidence supports a determination that the decedent possessed the residual functional capacity to perform the exertional requirements of sedentary work, I conclude the Administrative Law Judge's required evaluation of the subjective evidence of chest pain and medication side effects is not supported by substantial evidence. Additionally, I note that following the Administrative Law Judge's decision in this case the decedent died from his heart condition. Record p. 558. Upon remand, the Secretary is to consider the additional evidence of his death when remaking the disability determination. *See Abair v. Secretary of Health & Human Servs.*, 590 F. Supp. 1062, 1067 (D. Mass. 1984).

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

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nitroglycerin patches. *Physician's Desk Reference* at 1354 (Minitran), 2387 (Transderm-Nitro); *see also Ownbey v. Shalala*, 5 F.3d 342, 345 (8th Cir. 1993); *Smith v. Eason*, 865 F.2d 1259, 1988 WL 138736 at \*1 (4th Cir. 1988) (use of *Physician's Desk Reference* an appropriate exercise of judicial notice under Fed. R. Evid. 201(b)(2)).

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 20th day of December, 1993.***

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***David M. Cohen  
United States Magistrate Judge***